

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
UMB BANK, NA, : Docket #15cv8725
Plaintiff, :
- against - :
SANOFI, : New York, New York
May 14, 2019
Defendant. :
----- : DISCOVERY CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE JUDGE ROBERT W. LEHRBURGER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: We're here in the matter of a discovery conference, 15cv8725, UMB Bank, NA versus Sanofi. Attorneys, please state your name for the record.

MR. CHARLES GILMAN: For plaintiff/trustee, Charles Gilman, Cahill Gordon & Reindel.

MR. JOHN NEUWIRTH: Good afternoon, Your Honor, John Neuwirth from Weil Gotshal for defendant Sanofi.

THE COURT: Okay, is see we have quite a crew -- oh, sorry.

MR. STEVEN PARADISE: I'm Steven Paradise and I'm here on behalf of the nonparty, Stonehill.

THE COURT: Okay, thank you. All right, I see we have quite a crew, I was just contemplating that in retrospect it may have not been necessary to do this in person, but I haven't seen you all in a while so it can't hurt. And the reason we are all together is because of Sanofi's request to be able to depose one of the CRB holders, both the entity and individual, although in the case of the deposition of the entity it may be the same individual.

One reason I did want to see you was to ask a question which is, although let me preface it with the reasons you give for taking the deposition are all fine and good, you still don't explain what the

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relevance of what you will be asking is. What is it you want to find out and what will it be relevant to in terms of the issues?

MR. NEUWIRTH: Sure, Your Honor. Your Honor, as we set forth in our letters, and as we set forth in our letters when we sought the document subpoenas, there is a named plaintiff here, and it's the trustee, but there is no question from the documents that have been produced that there is a group of investors that are funding this litigation and driving this litigation. They are not the named plaintiff, but there is one of them and that's Stonehill, which is clearly the lead investor that if not in name is the plaintiff, is the co-plaintiff. Is standing right next to the plaintiff in this case and is consulting with the trustee, the plaintiff, on all decisions and with respect to the prosecution of this litigation.

THE COURT: Right, presumably the trustee wouldn't be bringing this case if the CRV holders weren't asking for it, so.

MR. NEUWIRTH: That's correct. But there's one plaintiff, in particular, and that's Stonehill. And remember, Your Honor, step back, we initially served subpoenas on 26, I think, of the CV holders. Your

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Honor quashed those subpoenas and said if you take, if it turns out later in this case that it becomes necessary to apply to the Court for discovery of any of the CVR holders, you're welcome to come back. Or maybe not welcome, but you can come back and do that.

We took the deposition of the trustee, UMB, promptly after taking that deposition we sought leave to serve document subpoenas, not on all 26 CVR holders, but only on Stonehill which was the lead entity.

THE COURT: Right.

MR. NEUWIRTH: And the reason we did that is because this is an unusual case. Stonehill is driving the litigation process. There is a named plaintiff, yes, that is a trustee, but nothing happens without Stonehill's --

THE COURT: And what's the relevance of that?

MR. NEUWIRTH: Sure. Well just like a plaintiff, Your Honor, and even though this is a breach in contract case, we would be able to ask any question essentially that we wanted of the named plaintiff in the litigation, and here Stonehill is all but named the plaintiff in the litigation.

So, for instance, maybe Stonehill doesn't

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think so much of these claims. If we ask the plaintiff that question in the litigation, sure it would be relevant to know that the plaintiff doesn't think much of the claims that it's bringing. Well what happens if Stonehill, which is the driving force behind this litigation, because we all know it's not the trustee that's the driving force behind the litigation, but Stonehill. If Stonehill has that type of information, we're entitled to discovery that.

Maybe somewhere down the line the trustee will make a motion when we're at trial trying to exclude evidence on the grounds that it's not admissible, but we're certainly entitled, given the unique circumstances of this case, to at least discover that information now. That's the relevance, Your Honor, and that's one example of relevance.

Your Honor has already ruled in the October 18 order on issues of proportionality and burden. There is no burden here, Your Honor, and no claim as to burden really has been made by Stonehill, maybe we'll hear something different today. Stonehill is in New York, we're talking about one deposition, we're in New York, there's plenty of time left within the confines of the schedule, expert discovery currently runs out

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until the end of July, we're talking about scheduling one deposition, fact deposition between now and then.

And as for proportionality, we're never going to get to proportionality in this case, as the Court knows. There have been twenty fact depositions of Sanofi, there has been one fact deposition on the other side, we're trying to get a second.

THE COURT: Who did you depose?

MR. NEUWIRTH: Who did we depose?

THE COURT: Yes.

MR. NEUWIRTH: A gentleman named Gavin Wilkinson at UMB, at the trust company, a representative of the trustee. So all we're asking for is our second and probably final fact deposition. We think that deposition is likely to be of Mr. Stern, we served a 30(B)(6) notice, we think he's the most knowledgeable. The documents suggest that he is. And that's all that we're asking for. And the reason we're asking for it is in all but name, he is the plaintiff here. And just like we'd be entitled to probe the plaintiff in the litigation, even a breach of contract suit we think we should be entitled to probe the actual plaintiff here.

THE COURT: Okay, thank you. Mr. Gilman, the

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beard becomes you, I almost didn't recognize you at first.

MR. GILMAN: I don't believe that Sanofi could depose even the trustee on things like motive in a breach of contract action. The law of this case is clear, motive is not relevant to the claims asserted. There are no counterclaims in this case. The trustee's conduct is not at issue in this case. Stonehill is not a party to the lawsuit. They were not involved in the negotiation of the CVR agreement for contract at issue in this case. Their view of that contract is no more relevant than a bystander on the street. It is the parties' view, it is the parties' negotiation, the parties' obligations of performance that are or are not at issue and are or are not relevant.

THE COURT: Well and one party is UMB but who's the party on your side of the ledger?

MR. GILMAN: Well think of this as a class, as it were, you have plaintiff.

THE COURT: And in class actions named plaintiffs get deposed and sometimes non-named plaintiffs bet deposed.

MR. GILMAN: Only on their own investments in the sense of that kind of a claim where the investment

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is the issue, did you rely on the prospectus, didn't you rely on it, that kind of a thing. That's not an issue here. The only issue in this case is did Sanofi comply with its obligations of diligent efforts or commercially reasonable efforts, depending on the milestone.

There are no damages at issue in this case. Counsel says he wants to depose Stonehill on the valuation of the CVRs. Damages are not at issue. If there is a breach proven, and that breach causes a milestone to have been missed, the contract says you get a dollar, or you get two dollars, or you get three dollars per CVR, it's set forth in the contract. Principal amount of damages is set forth to the penny and is not at issue. Prejudgment interest is set forth, the contract breach rate of interest is set forth. It's prime plus 3 percent. There are no issues of damages. The only issue is liability, did Sanofi honor its contractual obligations which are mandatory. Sanofi shall use diligent efforts to achieve the approval milestone and the sales milestone, they shall use commercially reasonable efforts to achieve the production milestone. The issue is did they or did they not. We have a battle of experts.

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We're in the middle now of having just received seven expert reports from Sanofi. We're preparing, pursuant to the existing scheduling order, as to which we're not seeking any relief, to take the depositions if there's even experts. Now they lob in, in the middle of this process, a request to take three depositions five months after the close of all fact discovery and they haven't answered Your Honor's question of what's the relevance. I haven't heard counsel say if I ask them X and they said Y I could use that. There is not a single question that I have thought about, the answer to which from a nonparty would be relevant to any claim or any defense pled in this action.

What they're trying to do is tar the beneficiaries for whom the action is brought so they can stand up in front of a jury and say they're big, pad hedge funds, they're not mom and pop that used to own Genzyme stock. They're the hedge funds that bought the CVRs from mom and pop. And they're bad people because, and that's what this is all about. And this has nothing, nothing to do with a breach of contract action, it has nothing to do with any claim or defense live and pled in this case.

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I think that we would all like to take a little more discovery. I'll represent to the Court there are issues that in planning on summary judgment and other motions we've thought about, we'd like to fill in, we'd like to do this --

THE COURT: Well, of course, but this isn't something out of the blue, I mean it's something that had been addressed before and I did leave an out for potentially coming back.

MR. GILMAN: Stonehill has been known to them for over two years.

THE COURT: Sure.

MR. GILMAN: Stonehill as investor, Stonehill as a lead investor, Stonehill every quarter publicly files with the SEC, and I know that counsel tracks it, their investments, including their investments in CVRs at issue in this case. They've known this for two years. They're waiting five months after the close of all fact discovery to take depositions and again, I haven't heard counsel posit a single fact that he thinks he might be able to elicit that would be relevant. What Stonehill thinks about provision X, why it was Z in the contract, is not relevant, they're not a party to the contract. What Stonehill thinks about

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2 the value of the CVRs is not relevant because the
3 contract says if there's a breach you get the
4 following to the penny set forth in the contract.
5 Your Honor, there is no relevance.

6 THE COURT: You mentioned three subpoenas or
7 three separate depositions but I hear from the defense
8 that it's more likely to be one.

9 MR. GILMAN: I don't know that. Counsel for
10 Stonehill is here.

11 THE COURT: Okay.

12 MR. GILMAN: All I know is that there are two
13 separate legal Stonehill entities which each caught a
14 30(B)(6) subpoena, and there is an employee who caught
15 a subpoena. And my understanding is under Rule
16 30(B)(6) the corporation designates its
17 representative, not Mr. Neuwirth.

18 THE COURT: Right. No, that's true, but I do
19 want to ask, but I'll allow counsel for Stonehill to
20 address that, and actually I'd like to hear from him,
21 so thank you.

22 MR. PARADISE: Thank you, Your Honor, again,
23 Steven Paradise of Seyfarth Shaw here on behalf of
24 Stonehill. Let me first ask that the Court not draw
25 any adverse from where I am sitting, there is simply

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no room at the other side's table.

Your Honor, I'm going to try not to duplicate anything that Mr. Gilman's said because I would have said many of the same things. But I would put it this way, picking up on what Mr. Neuwirth said in terms of the relevance, and I would like to talk about burden, as well. But the question would be suppose the discovery determines that Stonehill believes this is a great claim and it's the greatest claim ever. And this is a rhetorical question although Mr. Neuwirth is free to answer it, does that mean that Weil Gotshal concede and stipulate to the fact that the claim is a valid claim, of course they would.

At the same time, Your Honor, the fact that Stonehill has negative views on the claim, which I don't believe to be the case but I don't know, equally has absolutely zero relevance to the merits of this case, as Mr. Gilman just laid out for you in his argument.

And turning to burden, the notion that there is no burden is silly. It's a 30(B)(6) deposition, as Your Honor knows, that requires that we do somewhat of an investigation among other employees. Mr. Stern, I'm not going to deny, is a significant employee in

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2 connection with this investment, but there are other
3 employees involved in this investment. And we would
4 have to interview them, make sure we gather their
5 knowledge to make sure that the witness that we do
6 choose to designate at the appropriate time is able to
7 respond to the seven quite broad topics that are in
8 the notice, Your Honor. I also point out to you,
9 speaking of the topics, they're identical to the seven
10 topics that were in the subpoenas.

11 And Your Honor said that the discovery should
12 be focused and narrow. You're telling me that from the
13 seven broad categories of document requests that they
14 made, and by the way, Your Honor, we tried to
15 negotiate them down in good faith, both sides,
16 ultimately we got, as I joked with Mr. Amsel, I got
17 nothing from him. But we decided to go ahead and
18 produce the documents because we've got nothing to
19 hide and we didn't want to burden the Court and slow
20 the process down, so we ended up producing a lot of
21 documents.

22 But the fact of the matter is, there is a
23 burden in connection with preparing a 30(B)(6)
24 witness. And whether it's Mr. Stern, or it could be
25 more than one witness, as Your Honor knows, but the

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more important thing is, and your rules, you know, I read them, Your Honor, and you make it very clear that one of the big issues is the burden or expense of the proposed discovery and whether it outweighs the likely benefit. I've heard no benefit here, whatsoever. At best, it's slight and it's aspirational. I think they're hoping that through a deposition Mr. Stern will say something embarrassing or something he wouldn't have wished to have said and they can somehow use that in the case going forward, similar to what Mr. Gilman just argued. But that benefit, Your Honor, I do not believe comes close to approaching the burden. I'm not saying it's the greatest burden in the world, but there is a burden, and that burden well outweighs any benefit that the plaintiffs will obtain, I'm sorry, the defendants will obtain from these depositions.

THE COURT: Okay, thank you. Mr. Neuwirth, I know you want to respond, but let me ask a few direct questions. First of all, do you agree or disagree with respect to the damages point? That is that the amount in controversy is essentially set by the contracts and that discovery need not really address the damages issue?

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MR. NEUWIRTH: Well I don't agree, Your Honor.
I think the point was made that this is all about
liability and not about damages. Even assuming for
the sake of argument that liability could be
established, in other words, even if it could be
proven that diligent efforts were not used, it still
needs to be proven that with the exercise of diligent
efforts the milestones would have been achieved.
THE COURT: Yes, but in terms of monetary
amounts, if plaintiff were to succeed on the merits in
terms of what they would recover, it would be
determined by the contracts, is that right?
MR. NEUWIRTH: The milestone amounts are
fixed, Your Honor.
THE COURT: So is there any other amounts that
would be in controversy?
MR. NEUWIRTH: There is an attorneys' fee
claim in the case.
THE COURT: Okay, well you don't need a
deposition, well, you might.
MR. NEUWIRTH: We may. We might, and, again,
I don't think the plaintiffs would characterize it as
their main claim in the case, but it is a separate
count. There is a claim that we pay all of their

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attorneys' fees in this case.

THE COURT: Right. Well attorneys' can be addressed in a second phase I would think, but go ahead.

MR. NEUWIRTH: So there is what I would characterize as that damages or causation issue, which I think is fair to explore. As for relevance, Your Honor, I think I answered it directly. What we have here is Stonehill which was --

THE COURT: Well it's the same answer every time that I've asked this question, and I remember previously, but go ahead.

MR. NEUWIRTH: Your Honor, I think it is relevant that when you have the driving force behind the litigation that is the plaintiff in all but name, that we are entitled to probe what that person thinks or that entity thinks about this litigation. There are all sorts of questions we could ask in that regard that would get at what they think about the merits of the claims. That's relevant, just like it would be relevant if we asked that of a plaintiff.

These are hedge funds that bought these CVRs in the aftermarket, what do they think about the actual claims? Do they actually think they have legs

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or is this just an investment opportunity based on something else? That's relevant. Counsel said that what we want to do is paint the hedge funds as big, bad hedge fund people or something.

THE COURT: You can do that without a deposition.

MR. NEUWIRTH: By the way, I think we have the right, and we can fight about this later at trial and they can try to exclude this, I think we have the right to try to put a face on who is behind this litigation, I think that's completely appropriate for discovery. This would be an unusual, unusual case if we can't at least try to put on that evidence if we so choose. They can try to exclude it in limine or otherwise as we get towards trial, but now to try to take a deposition is totally appropriate, Your Honor. This is an unusual situation where in a case of this magnitude, with over a billion dollars at stake alleged in damages, that we're arguing about whether we can take a second deposition of an entity that is here in New York. And we think, again, Mr. Gilman is absolutely right, I don't designate 30(B)(6) witnesses, but we think it's probably one person.

THE COURT: Right. Let me just ask you

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something, I'm looking at the subpoena, so just for instance, why is due diligence done by (indiscernible) irrelevant, that's in number five, I'm just pulling that one out of the hat, I mean it's not like I'm focusing on it.

MR. NEUWIRTH: Again, Your Honor, I think it goes to the issue that I identified, which is how Stonehill feels about the strength or weaknesses of these claims and I think that's directly relevant to the underlying issue of the case. Just like an admission from a plaintiff would be.

THE COURT: Right. So if he was enterprising and wanted to look it personally, he might look into the contract, make some judgments on it, and come to some conclusions. He might have done some investigation, turned up evidence related to it. I'm going to assume, and it doesn't mean you don't get your deposition, but I'm just going to assume that most likely he consulted with counsel and it's all work product, but who knows.

Now I actually agree with the defendant that they're entitled to ask questions of whoever is essentially behind the litigation and ask questions along the lines of what they have set forth. It's not

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a tremendous burden in the scheme, it's not even a real burden in the scheme of this case, the amount at issue and the amount of discovery that has taken place on one side versus the other. The defendant has had opportunity for one deposition, that's what they've taken. They should be allowed to ask the person with the real interest or representative of the real interest, so I'm going to permit the depositions to go forward.

Mr. Gilman.

MR. GILMAN: Your Honor, this is manufactured in the following way. The CVR contract provides that upon request the trustee shall be reimbursed its out of pocket expenses. Sanofi refused to honor that obligation. We litigated it at the beginning of the case.

THE COURT: Right.

MR. GILMAN: It's an issue that is going to be adjudicated at the end of the case. There would be no funding holders if they had honored that obligation. There would be no alleged driving force if they had honored that obligation. Stonehill was not a CVR holder at the time of the merger. Stonehill wasn't a CVR holder at the time the contract was drafted, and signed, and executed. And whether Stonehill is worthy

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or unworthy has nothing to do with whether Sanofi has honored its contractual obligations.

And that may be, and that would be an issue for whether the evidence will come in at trial, but there are questions that can be asked that potentially get a matter that might touch upon issues in the case, and they may not. I mean the questions may result in attorney-client, they may result in work product, they may result in no content, but they're entitled to find out. And so I'm going to allow them go forward.

Yes, Mr. Paradise.

MR. PARADISE: I'm sorry, I apologize, Judge, here was one thing I did want to point out, it may be irrelevant but I do think it's important. Stonehill was not even involved at the time this lawsuit was initiated and filed. It was a different trustee, I don't know who was behind it, but Stonehill wasn't. And the other point is --

THE COURT: It may end up being a very short deposition.

MR. PARADISE: Well the other thing I would ask, Your Honor, is that we narrow the scope. I mean there's seven topics here and they want to get into Stonehill's trading method, there are things here that

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2 are proprietary and at the heart of a hedge fund. And
3 those are things that every hedge fund I've ever
4 worked with, and I'm sure Your Honor has encountered
5 it, is very protective of.

6 I also think that some of these topics do not
7 have to be included, we can limit the scope or the
8 time of this deposition.

9 THE COURT: Give me an example of something
10 because I'm skeptical that it's what defendant has in
11 mind in asking about, but go ahead.

12 MR. PARADISE: Well I think your decision to
13 hold a transacting CVR involves, you know, the inner
14 workings of theirs in terms of how they analyze a
15 portfolio holding, et cetera, it's well past the point
16 in time --

17 THE COURT: Well it may be a valid reason to,
18 I'm sorry, let me back up. There may be reasons to
19 ask about how they analyzed these CVRs and what was
20 the analysis for determining to invest in them. And
21 why did they value it at what they do, why do they
22 think it's going to produce a certain value. Did they
23 discount the chances of success in making the
24 determination of how to value and invest. And what did
25 they base that on, if it wasn't with counsel, maybe it

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was for some other reason. So there are questions that are relevant here.

MR. PARADISE: With all due respect, as Mr. Gilman articulated and I did, as well, I'm not sure how any of that is going to be relevant ultimately in this case.

THE COURT: It may not.

MR. PARADISE: The other suggestion, Your Honor, is they know Mike Stern is the principal involved and we don't dispute that, how about we just have Mike Stern be deposed and not have to have a 30(B)(6) and that extra burden that we have to go and interview people and educate them. Or have them pay for Stonehill --

THE COURT: Well, so --

MR. PARADISE: Stonehill is not a party in the proportionality issue, with all due respect, we've taken no discovery in this case.

THE COURT: I understand that, but if Stonehill were to produce a 30(B)(6) witness, defendant seems to be saying in most likelihood it would be Mr. Stern, is that true, not true?

MR. PARADISE: In all likelihood it would be Mr. Stern, but as I said earlier, we still have to

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educate Mr. Stern on these topics and make sure he has any knowledge that's in the organization that he doesn't personally possess.

THE COURT: Sure. Well, within reason, and I think, particularly if he is going to be the 30(B)(6) witness he should be able to offer testimony, both individually and on a 30(B)(6) basis.

MR. PARADISE: That, I'm sure, we'll be able to work out.

THE COURT: I think so.

MR. PARADISE: Thank you, Your Honor.

THE COURT: All right, anything else, any other issues we need to address since we're here?

MR. NEUWIRTH: Your Honor, there is one issue that I don't think is ripe for today.

THE COURT: Okay.

MR. NEUWIRTH: But I want to at least put it on the Court's radar. Mr. Gilman referenced expert discovery and we are in the middle of expert discovery, that's absolutely right. Plaintiff, in accordance with the schedule, served seven expert reports at the first date, which was January 25. We then served seven expert reports of our own that came from six experts on the second date in the schedule,

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which was April 5th of 2019. The next date that's coming up is June 14 for plaintiffs to serve rebuttal reports, if any. There may be a dispute bubbling up as to what rebuttal reports actually mean.

THE COURT: Sure.

MR. NEUWIRTH: We think the plain reading of the stipulation and certainly the intent behind the stipulation, which has been the stipulation for some time in this case, is that plaintiffs were going to go first and identify and serve expert reports, we were then going to go second and respond to their expert reports and serve any reports of our own, and then if there was any subject matter that was new that they didn't have an opportunity to have an expert on, they would then serve rebuttals.

It's possible, but I don't know based on our discussions, that on June 14 what we could see is more in the nature of seven replies.

THE COURT: Right. Well let's not speculate, let's see what happens. This is an issue that is not uncommon in these litigations, so let's address it when and if it arises.

MR. NEUWIRTH: That's fine, Your Honor. And the other piece to it, and again, I just wanted to put

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a marker on this because I didn't want, if it becomes an issue, and I hope it doesn't, I didn't want Your Honor to say why didn't you mention this when I saw you last time.

THE COURT: Sure, no, no.

MR. NEUWIRTH: There is a final stage for depositions that permits us to take depositions of their rebuttal experts which is about a month long. To the extent we get seven expert reports on whatever date, I'm not asking for an extension, but this goes to why we read the stipulation, among other reasons, as really providing only for rebuttal reports on June 14, not replies. Because the notion that we were going to take seven expert depositions in a month period is A) not what the document says; B) not what we would have ever agreed to.

But in any event, that's the issue that's out there, and we'll see what happens on June 14.

THE COURT: Okay. All right, anything else? No, all right, we are adjourned, thank you.

(Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of UMB Bank, NA v. Sanofi, Docket #15cv8725, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: May 16, 2019